REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 650/10

In the matter between:

BHP BILLITON KLIPSPRUIT COLLIERY **Applicant**

and

NUM OBO DLAMINI ALEXANDER **First Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Second Respondent**

LUNGILE MATSHAKA N.O **Third Respondent**

Heard: **3 November 2011**

Delivered: **11 November 2011**

JUDGMENT

SAVAGE AJ

Introduction

This is an application to review and set aside an arbitration award made by the third respondent ("the commissioner") on 11 December 2009 in which the dismissal of the first respondent ("Mr Dlamini") was found to be both procedurally and substantively unfair.

Mr Dlamini was found guilty of misconduct on 21 July 2009 following a disciplinary hearing and was dismissed on 4 August 2009. He referred an unfair dismissal dispute to the CCMA which was arbitrated on 24 November 2009. The applicant was represented by its Employee Relations Specialist, Mr Molefe, at the arbitration hearing and Mr Dlamini was represented by an official of NUM, Mr Mabuza. Mr Molefe was based at the applicant's head office and had been an observer at the disciplinary hearing. During the arbitration, neither party called any witnesses or presented evidence under oath. The commissioner found that Mr Dlamini's dismissal was both procedurally and substantively unfair and reinstated him into the same or similar position with the same terms and conditions of employment as previously enjoyed. Mr Dlamini was to resume his duties on 15 January 2010.

Arbitration award

The commissioner found:

> "…the problem lies squarely with the Respondent in proving that the dismissal of the Applicant was fair. This is mainly due to the fact that the Respondent has not brought in a single witness it had relied on when it imposed the dismissal sanction".

The commissioner then concluded that evidence led should be the best evidence and hearsay evidence would only be admissible in exceptional circumstances. He found that the applicant had not discharged the onus to prove that Mr Dlamini's dismissal was procedurally and substantively fair and recorded his difficulty in accepting the applicant's evidence given that it could not be tested for its veracity. The commissioner concluded that Mr Dlamini "is therefore entitled to be reinstated but full reinstatement is denied partly because he is to blame for what led to his dismissal".

Grounds of review

The applicant's grounds of review can be summarised as follows:

The conclusion reached by the commissioner was not justifiable in relation to the evidence led at the arbitration hearing; and

The commissioner erred in finding the dismissal substantively and procedurally unfair while finding that Mr Dlamini was "partly to blame for what led to his dismissal" without giving reasons for such finding.

Evaluation

Once a dismissal has been established, the employer must prove that the dismissal is fair in terms of sections 192(2) of the LRA. In determining whether the employer has discharged the onus to prove that the dismissal was fair, the court must select the most probable inference and by "balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one." (Wigmore on Evidence, (3rd ed. para 32). If this favours the employer, on whom the onus rests, then the employer is entitled to an award being made in its favour. If an inference in favour of both parties is equally possible, the onus of proof will not have been discharged and the dismissal, it follows, will not be found to be fair.

Section 138(1) of the LRA permits commissioners in the course of arbitration proceedings to 'deal with the substantial merits of the dispute with the minimum of legal formalities'. In undertaking such task, a commissioner is entitled to 'conduct the arbitration in a manner that the commissioner

considers appropriate in order to determine the dispute fairly and quickly'. Commissioners must however be guided by at least three considerations: the resolution of the real dispute between the parties; as expeditiously as possible; and in a matter which is fair.[1]

An arbitration award stands to be set aside only if the award is unsupported by any evidence, is based on speculation, is disconnected from the evidence or is made without appropriate consideration of evidence that may be considered unreasonable[2].

The record of proceedings clearly indicates that no witnesses were sworn in at the hearing of the matter and that the only oral evidence tendered by the applicant was that of Mr Molefe, the applicant's Employee Relations Specialist. This was in spite of the fact that there existed material disputes of fact between the parties relating to the fairness of the dismissal of Mr Dlamini. The applicant, a large multinational company, chose to be represented at the arbitration proceedings by Mr Molefe. It is not the applicant's case that Mr Molefe was unaware as to the manner in which arbitration proceedings before the CCMA are conducted or that he had no experience as to what was required of parties appearing at such proceedings and I am satisfied that, given his position, Mr Molefe could reasonably have been expected to have known what was required in order to present the applicant's case.

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[1] *CUSA v Tao Ying Metal Industries & others* 2009 (1) BCLR 1.

[2] See A Myburgh 'Sidumo v Rusplats: How the Courts deal with it' (2009) 30 ILJ 1

The approach adopted by Mr Molefe was to present the facts of the case himself, without having been sworn in as a witness, apparently on the basis that he had been an observer at the disciplinary hearing and although he did not have direct knowledge of the misconduct alleged to have been committed by Mr Dlamini. He called no further witnesses and at no stage applied for a postponement in order to allow him to do so, even when asked by the commissioner why he did not bring witnesses to testify[3].

This Court is entitled to set aside an arbitration award if the commissioner's decision falls outside of a band of decisions to which a reasonable person could come on the available evidence (see *Sidumo & another v Rustenburg Platinum Mines Ltd & others).*[4] It is accordingly not the correctness of the commissioner's decision which is relevant but whether the result of the arbitration proceedings is reasonable. I find that the decision of the commissioner that the onus of proof had not been discharged was a reasonable one on the basis of the evidence available to him. The applicant cannot fail to present material evidence before a commissioner but come to this Court in review proceedings and claim that the error was that of the commissioner. This is all the more so where the applicant is a multinational company with experience in labour matters. Were this Court to find differently, any applicant could attend at

[3] Record page 46 lines 5-7

[4] [2007] 12 BLLR 1097 (CC)

arbitration proceedings, fail to present material evidence relating to the dispute and then claim a reviewable irregularity on the part of the commissioner in failing to call for such evidence. This would serve only to undermine the current dispute resolution system.

This is not to say that it may, in fact, have been prudent for the commissioner to call for evidence from witnesses with direct knowledge of the alleged misconduct. However, for the reasons canvassed above, I find that his failure to do so does not create a reviewable irregularity which warrants the review and setting aside of the award.

The applicant's further ground of review is that the commissioner erred in finding the dismissal substantively and procedurally unfair while at the same time finding that Mr Dlamini was "partly to blame for what led to his dismissal" without giving reasons for such finding. As a consequence of this finding, the commissioner denied Mr Dlamini full reinstatement. I am not satisfied that this finding was material to the conclusion that the dismissal was procedurally and substantively unfair. Its only effect was to limit full reinstatement for Mr Dlamini, an issue with which he may have elected to take issue but did not. Accordingly, the award does not justify being reviewed and set aside on this basis.

In the circumstances, I find that the conclusion reached by the commissioner was justifiable in relation to the evidence before him and that the

arbitration award does not fall outside of a band of decisions to which a reasonable person could come on the available evidence. The application to review and set aside the arbitration award accordingly must fail.

Costs

The court has a broad discretion, set out in section 162 of the LRA, to make an order for costs according to the requirements of the law and fairness. The fact that the applicant has not been successful in this application militates in favour of a costs order in favour of the first respondent. There are no reasons before me to suggest why costs should not follow the result.

Order

Accordingly, I make the following order:

The application to review and set aside the arbitration award issued under CCMA case number MP6877/09 is dismissed with costs.

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K M Savage
Acting Judge

APPEARANCES:

APPLICANT: J A Raubenheimer

THIRD RESPONDENT: L Malan
Instructed by Finger Phukubje Inc, Johannesburg.